



Old Harbour, which was bumpy and unpaved; there were no streetlights on the section of the road on which the collision occurred and that the claimant was riding on a bicycle. The defendant admits that at all material times he was the owner of a 2006 Nissan Frontier motor truck registered 8150 DN, which was being driven by him on the 19th September, 2012 along the Old Harbour Main Road in the parish of Saint Catherine when a collision occurred with the claimant's bicycle.

- [3] The claimant said the road was not wet, the defendant said that it was. There was no evidence led by either side to suggest that the weather conditions or the surface of the road factored into the ultimate cause of the collision. It was also clear from the evidence that the claimant's bicycle bore no lights but had reflectors in the spokes of the wheels and on the rear.
- [4] It was the claimant's case that while he was riding his bicycle on the soft shoulder towards Old Harbour on the Old Harbour main road, the defendant drove his vehicle onto the said soft shoulder behind him. The claimant said that both he and the defendant had been travelling in the same direction. While he was riding on the soft shoulder, he observed the defendant failed to stop behind a white motor car, which had positioned to make a right turn. The defendant then drove onto the soft shoulder and continued thereon at a high rate of speed. This manoeuvre was described by the claimant as designed to pass the car, which had stopped to make the turn. All the while, the claimant had continued riding along on the soft shoulder. The claimant denies the presence of a truck on the road on that day.
- [5] The defendant's case was that he had been driving in his correct left lane behind a truck, which was slowing down; he slowed his vehicle to 20 km kilometres per hour. He saw the claimant riding his bicycle on his, (the defendant's) left side of the road coming towards him in the opposite direction. In cross-examination, the defendant said that the claimant had not been travelling in the middle of the road but to the left of his vehicle. The defendant said the claimant had passed the

truck then swerved further left, moving away from it. The defendant agreed that the claimant having swerved left and away from the side of his vehicle had in doing so moved further away from the vehicles on the road.

- [6] It was the evidence of the defendant that it was the claimant who had been riding along the soft shoulder on his bicycle which came over into his path. He denied that there had been a collision between his vehicle and the claimant on the bicycle as the claimant had swerved left and jumped from the bicycle leaving it in the driving lane. The defendant then ran over the bicycle.
- [7] In cross-examination, the defendant resiled from his witness statement and said when the claimant swerved left he was not directly in front of his vehicle. He accepted that the claimant could not have been in front of his vehicle. He further said that the claimant had been “riding on the left side coming up, alongside the truck”. The defendant failed to report the collision.
- [8] An examination of the evidence is therefore required and it is the evidence and my impression of the witnesses which will lead me to a determination of the issues of credibility and liability. There is also the substance of the evidence, which I have approached by applying my experience, reason, logic and common sense.
- [9] Where there is divergence between the evidence of the parties in a civil action for negligence involving a collision, the court is often urged to look at any independent physical evidence. In the Court of Appeal decision of **Calvin Grant v Paredon and Paredon** Suit no. C.L. 1983/G. 108 delivered by Theobalds J on April 18, 1986 it was held that:

*“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass which may be left on the*

*driving surface and so on. This physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth.”*

- [10] In the instant case, the extrinsic physical evidence would have been of assistance to the court. However, there was merely a description of the injuries suffered by the claimant and the damage to the bicycle as given by the claimant. It is not in dispute that the defendant had run over the bicycle.
- [11] The direction of travel is an issue to be determined. The claimant claims to have been travelling in the same direction as the defendant, which was towards Old Harbour. The defendant indicates that he had been travelling in the opposite direction. It is clear to me that the claimant had been riding on the soft shoulder and that this meant that he was to the left of the defendant's vehicle. I accept the defendant's evidence that the claimant had been travelling in the opposite direction as it is more consistent with logic and with the injuries, he sustained. I also accept the defendant's evidence that there was a truck, which would have prevented him from seeing the claimant's bicycle until he came alongside the truck.
- [12] I find that the defendant took and executed the decision to pull out from behind the truck and drive on the soft shoulder in order to pass the traffic, which had slowed ahead of him. It was then that the claimant swerved left to avoid a collision with the defendant and fell from the bicycle. I did not accept that the defendant's vehicle hit the claimant from the bicycle, but that the claimant jumped from the bicycle in order to avoid a collision between the vehicle and his person. In so doing, the claimant fractured the first metatarsal of the left foot. The claimant did not sustain the injuries one would expect to find had the motor truck collided with the rear of the bicycle as he said.

### **The Law**

- [13] It is settled law that in order for a Claimant to succeed in a claim for negligence, he must prove on a balance of probabilities-

- (i) that the Defendant owed him a duty of care;
- (ii) a breach of that duty of care; and
- (iii) damage resulting from the breach.

[14] Similarly, it is settled law that all users of the road owe a duty of care to other road users. Under the Road Traffic Act, a common duty of care is owed to all road users and as such motorists are generally required to exercise reasonable care so as to avoid causing injury to others and/or damage to property. The following sections of the Road Traffic Act specifically outline the duty owed to other road users.

Section 51(2):

*“Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid a collision, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.”*

Section 58(1):

*“A person shall not drive a motor vehicle on a road recklessly or dangerously or without due regard for the safety of other persons or property.”*

[15] Lord Macmillan defined ‘proper care’ in the case of **Bourhill v Young** [1943] A.C. 92, where he stated:

*“proper care connotes avoidance of excessive speed, keeping a proper look-out, observing traffic rules and signals and so on.”*

[16] This decision as well as **Almon v. Jones** (1974) JLR 1474 stand for the principles that a reasonable man in exercise of his duty of care must keep a proper look out, observe traffic rules and signals, avoid speed and use the road according to accepted principles, such as passing on the right, not overtaking on a corner and stopping at road junctions.

- [17] It is the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent. (See **Foskett v Mistry** [1984] R.T.R. 1, CA.) He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends.
- [18] When these requirements have been satisfied, the defendant is liable in negligence. It is for the court to determine whether on the facts as established, negligence is to be inferred or not. The more credible and probable of the facts raised is a matter to be weighed in the balance.
- [19] It was put to the claimant that the first time he saw the van was when he came around the truck into the path of the van. This is at odds with the defendant's evidence that the claimant swerved left and away from the left side of his van. This would have been further to the defendant's left. It was also the evidence of the defendant that the claimant was not in the middle of the road but was on the left of the road, this agrees with the evidence of the claimant that he was riding on the soft shoulder and tried to swerve out of the way when he saw the oncoming van.
- [20] The defendant also said in cross-examination that he did not apply his brakes before the accident nor did he swerve or take any action to avoid the collision. Section 51 (2) of the Road Traffic Act places a duty on a driver to take steps to avoid an accident. In the decision of **Cecil Brown v. Judith Green and Ideal Car Rental** Claim No. 2006 HCV02566 delivered October 11, 2011, Her Ladyship Justice McDonald-Bishop (as she then was) is noted as having referred to the provisions of the Road Traffic Act and the common law and going on to declare:-

*"It is clear that there is indeed a common law duty as well as a statutory duty for motorists to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident."*

[21] The defendant said he stopped 4-5 seconds down the road which raises an inference that he was speeding. However, it is not the only possible inference raised on the facts. The unexplained failure to report the collision and, the defendant having admitted to having run over the claimant's bicycle, as required by section 39 of the Road Traffic Act, gravely undermined the defendant's credibility and raised a consciousness of guilt.

*“39.-(1) If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle.*

*(2) If in the case of any such accident as aforesaid the driver of the motor vehicle for any reason does not give his name and address to any such person as aforesaid, he shall report the accident at a police station or to a constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence thereof.”*

[22] The defendant raised the issue of contributory negligence. Viscount Birkenhead in **Admiralty Comrs. v. SS Volute** [1922] 1 AC 129 was noted as providing a definition. “The test, he said, is whether the claimant in the ordinary plain sense of this business .....contributed to the accident”.

[23] It was also noted that in **Nance v. British Columbia Electric Rly Co. Ltd.** [1951] 2 All ER 448, the court said in order to establish the defence of contributory negligence:-

*“All that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury”.*

[24] This is a case in which the claimant was riding in the wrong direction, though he did so, on the shoulder. The words of du Parig L.J. in **Lewis v. Denye** [1959] KB 540 are instructive –

*“The defence of contributory negligence – the defendant must prove first that the plaintiff failed to take ordinary care of himself, or in other words such care as a reasonable man would take of his own safety and second that this failure to take care was a contributory cause of the accident”.*

[25] I do not find that the claimant failed to take care of his own safety as he was not riding on the roadway and the defendant should not have been driving on the soft shoulder. A bicycle is included in the definition of traffic in section 51(3) of the Road Traffic Act, although not defined as a motor vehicle in section 11. Traffic is not expected to be moving along on the soft shoulder. The cyclist therefore had a duty to ride in the direction in which traffic was flowing. However, even if he had been riding in the direction in which traffic was flowing, this accident would more probably than not still have occurred; given that the defendant was driving a motor truck along the soft shoulder. The claimant when he saw the vehicle approaching him swerved left but could not get out of the way without jumping from the bicycle.

[26] Had the defendant continued along the roadway towards Old Harbour rather than suddenly driving onto the soft shoulder in order to pass the stopped motorcar thereby being in the same path as the claimant on his bicycle; the accident would never have occurred. Alternatively, had the defendant waited until he could continue to traverse the main road in his correct left lane, the accident would never have occurred. Further, it is clear that there was a failure on the part of the defendant to avoid the collision the claimant had no opportunity to do so. In so doing the defendant is adjudged solely liable in the collision, since on the facts as found, the claimant did nothing to contribute to the accident and in fact was the only one who tried to avoid it.

[27] By way of damages, special damages were agreed at \$24,414.00 with the addition of a reasonable sum for transportation as conceded by counsel Mrs

Brown-Rose, that sum is \$24,000.00. Special damages therefore total \$48,414.00

[28] General damages for pain and suffering were also agreed. The medical report Dr. Jithendra Vijayendra dated June 26, 2015 from the Kingston Public Hospital, stated that as a result of the collision the claimant suffered: "from a fracture first metatarsal of left foot." There was no resulting disability diagnosed by Dr. Jithendra Vijayendra however, since the date of the accident, the claimant in evidence said he still suffers from pain.

[29] Both sides relied on the case of **Errol Finn v Herbert Nagimesi & Percival Powell** Suit No. C.L. 1991 F 117, where the claimant was awarded \$64,365.00 for a compound fracture of the 5th metatarsal of left foot and wound at fracture site requiring stitches. Today this award updates to \$646,235.94 using the CPI of 257.4. It was agreed that the claimant at bar spent more time in treatment though the injury to Errol Finn may be considered more serious. A reasonable award under this head was submitted by both counsel to be between \$700,000.00 to \$850,000.00

[30] The claimant has satisfied the court on a balance of probabilities that the defendant breached his duty of care such that he should be held liable for any injuries. As a consequence of the foregoing, the court makes the following orders:

1. Judgment is awarded to the claimant
2. The claimant is awarded special damages in the sum of \$48,414.00 with interest at 3% from September 19, 2012 to December 7, 2018
3. General damages for Pain and Suffering in the sum of \$700,000.00 with interest at 3% from the November 3, 2015 to December 7, 2018.